In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 486

RALPH HUBERT HOUSTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted, after trial by jury in the Albany Division of the Middle District of Georgia, on three substantive counts charging violations of the provisions of the Internal Revenue Code relating to illegal distilling operations and, with eight others, of conspiracy to violate these provisions. The conspiracy (count one) was charged to have existed from September 30, 1966 until May 19, 1967, and to have had as its objective the possession of unregistered stills, the carrying on of a distillery business without

giving bond as required by law and with intent to defraud the government of taxes, the concealment of untax-paid whiskey with intent to defraud the government of taxes, and the possession and transportation of whiskey whose containers did not have tax stamps affixed thereon (R. 1-5). The substantive counts charged that within the period of the conspiracy, petitioner and certain codefendants possessed an unregistered still (count two), carried on a distillery business without giving bond (count three), and carried on such business with intent to defraud the government of taxes (count four) (R. 5-6).

Petitioner was sentenced to concurrent terms of four years' imprisonment on each count (R. 456, 467). The court of appeals affirmed his conviction on each of these four counts (Pet. App. 19-23).[1]

1. Petitioner challenges the sufficiency of the evidence on the three substantive counts, on the ground that there was no evidence to show that the still was "set up" and complete on the date in question. There is, however, no occasion to consider this contention. The evidence on the conspiracy count and petitioner's connection therewith—the sufficiency of which has

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[1] The court of appeals reversed petitioner's conviction on count 10—charging the possession of property used in violation of the laws against illegal distilling (26 U.S.C. 5686(a))—on the ground that there was insufficient evidence to show that this property (a gas tank) was used in the manufacture of liquor (see Pet. App. 22). The jury disagreed as to count six, which charged petitioner and two codefendants with transporting whiskey whose container did not have a tax stamp affixed thereon, in violation of 26 U.S.C. 5205(a)(2), 5604(a).

never been challenged—was not limited to activities which formed the basis of the substantive counts in which he was named; to the contrary, it was alleged and proved that he personally participated in the commission of a variety of overt acts in furtherance of the conspiracy, six of which (Nos. 1-4, 7, 9) were not covered by the substantive counts in which he was named (R. 3-5). Accordingly, the claimed insufficiency of the evidence supporting petitioner's substantive conviction would not affect the validity of his conspiracy conviction. Since he received a concurrent sentence for each count which was less than the statutory maximum (R. 455-456), it is unnecessary to consider the sufficiency of the evidence supporting the verdict on the substantive counts. *United States* v. *Romano*, 382 U.S. 136, 138; *United States* v. *Gainey*, 380 U.S. 63, 65; *Lawn* v. *United States*, 355 U.S. 339, 359.

In any event, petitioner's contention was correctly rejected. A still is "set up" within the meaning of the statutory provisions proscribing illegal distilling operations when, although some minor adjustment may be necessary, the still is essentially capable of immediate operation. See *Guy* v. *United States*, 336 F. 2d 595 (C.A. 4); *United States* v. *Moses*, 205 F. 2d 358, 359 (C.A. 2); *Otto* v. *United States*, 29 F. 2d 504, 505 (C.A. 7). Unlike *Liverman* v. *United States*, 260 F. 2d 284 (C.A. 4), relied upon by petitioner, where the still was in fact dismantled when the accused was arrested on the premises, in this case there was direct testimony that it was "set up" (R.

84, 86-87) and operating (R. 163, 192, 194, 230). The evidence thus met the statutory requirement.

2. When the case was called for trial, the trial court fully explained to the defense the possibility of challenging the method of selection of the petit jury in the Albany Division of the Middle District on the basis of *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5). Petitioner, however, waived his right to challenge the jury by a formal stipulation, approved by the trial court, which set forth that he had conferred with counsel before making this decision and that it was his desire to be tried by the then existing jury panel in the Albany Division (R. 18-19). For the first time on appeal, petitioner asserted—as he now claims in this Court—that, prior to executing the stipulation, the United States Attorney in the presence of his trial counsel advised him that if he objected to trial in the Albany Division on the ground that the jury was improperly constituted, he would have to be tried later in the Macon Division and that he entered the stipulation because he was not advised of his right under Rule 18, F. R. Crim. P., to object to such transfer and feared being tried by "a jury of strangers" in Macon (Pet. App. 17-18). This assertion is contradicted by an affidavit filed with the court of appeals by the United States Attorney (G. Br. App. 22-23),[2] as well as by an affidavit filed by petitioner's trial counsel which stated that the stipulation was entered into because of his and petitioner's

[2] "G. Br. App." refers to the appendix to the government's brief in the court of appeals, which is being lodged with this brief.

belief that the then existing jury panel would be tactically advantageous to the defense (G. Br. App. 21-22). The court of appeals correctly held that it could not go outside the record to make a determination in the first instance of petitioner's allegation (Pet. App. 20-21).

We note, in addition, that petitioner's own assertions establish that he attached more importance to trial by jurors who were not "strangers" than to trial by a jury convened in conformity with *Rabinowitz* (which transfer of the case to Macon would have secured for him). The gist of his objection is that he should have been informed that he had the absolute right to insist upon both. On its face, however, Rule 18—which was amended to repeal the former requirement of venue by division rather than merely by district—would not appear to create any absolute right in a defendant to insist upon trial in any particular division. The court of appeals' interpretive gloss upon the Rule in *Dupoint* v. *United States*, 388 F. 2d 39 (C.A. 5)—which seemingly has the effect of at least partially nullifying the amendment within the circuit—was not rendered until after trial of this case. Petitioner's choice of trial in Albany cannot be said to have been coerced because the trial court, the United States Attorney, and his own counsel did not anticipate the *Dupoint* decision and advise him accordingly.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

JEROME M. FEIT,
MARSHALL TAMOR GOLDING,
Attorneys.

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